



STATEMENT OF

NATIONAL TREASURY EMPLOYEES UNION

ON

WHAT PRICE FREE SPEECH?: WHISTLEBLOWERS  
AND THE CEBALLOS DECISION

TO

COMMITTEE ON GOVERNMENT REFORM  
UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 29, 2006

The National Treasury Employees Union (NTEU) thanks the Committee for this opportunity to address the significant adverse consequences that the Supreme Court's recent decision in Garcetti v. Ceballos, 126 S. Ct. 1951, 2006 U.S. LEXIS 4341, 74 U.S.L.W. 4257 (May 30, 2006), has on federal employees and the public at large. NTEU has a long tradition of fighting to protect the free speech rights of government employees, both in the courts and through the legislative process. NTEU has championed this cause both to protect the rights of the employees it represents to speak out and express dissent and to further the broader public interest in hearing what employees have to say. Safeguarding the rights of federal employees to free speech is essential to the public's interest in averting or uncovering fraud, waste and abuse, and in promoting the public safety as well as the national security.

The Supreme Court's recent Garcetti decision has serious implications for public employees whose conscientious pursuit of their duties lead them to make disclosures of wrongdoing or to express unpopular views, even when such views are expressed internally, through the regular "chain of command." In fact, the perverse result of the decision in Garcetti is to encourage employees to go public with their concerns, in order to secure the protection of the First Amendment, rather than to pursue their concerns internally, where the Court has held that their speech is unprotected.

Further, as described below, the Court's decision in Garcetti makes more urgent the need for reforms to the Whistleblower Protection Act (WPA), to fill the loopholes in protection that the Garcetti decision has created. NTEU, therefore, commends the Committee for its focus on this issue.

Earlier in this Congress, the House Government Reform Committee cleared two bills for floor action, H.R. 1317 and H.R. 5112, that together would resolve the some of the critical deficiencies in current federal whistleblower statutes. These bills have not yet been scheduled for floor action.

Last week, however, the Senate did approve, as an amendment to the FY 2007 Defense Authorization bill, S. 494, the Federal Employees Protection of Disclosures Act. If enacted, S. 494 would make substantial improvements to the protection afforded federal employees under the WPA, and rectify the most of the damage done by the Garcetti decision.

The Union hopes that this hearing will serve as a catalyst for the House to accept the Senate federal whistleblower provision in the upcoming House-Senate conference on the Defense Authorization bill.

### **The Garcetti decision**

In Garcetti, the Supreme Court discussed at length the vital role that federal, state, and local employees play in the public debate on the most important issues of the day. In numerous prior decisions as well, the Court has recognized the important public interest in receiving the "well-informed views" of government employees. Slip op. 7. Indeed, it has acknowledged that public employees are often in the best position to know what ails the agencies for which they work, and their contributions can greatly inform the public debate. Moreover, the importance of the message to the public understanding is often directly correlated to the degree to which the message relates to the employees' duties. The more an employee knows about a particular topic--in many cases because it is the employee's job--the more useful the information will be to the public.

Despite this recognition of the public interest in hearing employees' views, well informed by expertise developed from their professional backgrounds and on-the-job experiences, the Court nevertheless held (in a 5-4 decision) that speech by public employees made pursuant to their official government duties is not entitled to protection under the First Amendment. The precise scope of this holding is, as yet, unclear because the lower courts will have to address the breadth of employees' duties in individual cases and the circumstances under which speech will be deemed "pursuant to" those duties.

At a minimum, however, it is clear at this point that employees who uncover and reveal wrong-doing or risks to the public safety and national security in the course of performing their jobs, or who argue internally in opposition to the "party line," will not be able to invoke constitutional protections should they suffer retaliation. Instead, they will be forced to place their trust exclusively in what the Supreme Court majority called the "good judgment" of their government-employer, which the majority asserted would be "receptive to constructive criticism." Slip op. at 13. In the event that the employer failed to be "receptive," the Court assumed that employees could fall back on what it

naively termed "the powerful network of legislative enactments--such as whistle-blower protection laws and labor codes." Id. As Justice Souter outlined in his dissent, however, and as described below, those protections are grossly inadequate, particularly in the federal sector.

**The Supreme Court's faith in a government "receptive to constructive criticism" is demonstrably misplaced.**

It is a sad fact of history that in the federal government, as in its local and state counterparts, there have been many occasions in which views that contradict the established orthodoxy have been discouraged or penalized. The suppression of dissenting opinions is often not related to the merits of the views expressed, but is instead driven by motives that are inconsistent with the public interest, such as politics, protection of bureaucratic turf, or even corruption.

Speech in furtherance of employees' duties--speech that perhaps has the most potential of making an informed contribution to the public interest--is also the speech that is the most vulnerable to suppression. Agencies, under the guise of supervisory review or high-level policy review, have been known to tone down messages of potential hazards, or to censor them entirely. Career public servants have seen their reports amended or suppressed because they did not conform to the general policy objectives or political imperatives of the current political appointees heading their respective agencies or other reviewing authorities within the Administration. Those who protest and persist in pressing their conclusions--particularly those who feel compelled to take the dispute to Congress or the media--are prime targets for retaliation.

Dr. David Graham, the scientist with the Food and Drug Administration (FDA) who was directed to soften his conclusions regarding dangerous side effects of the pain drug Vioxx, is only one of many examples. As an associate science director at the Office of Drug Safety at the FDA, Dr. Graham prepared a study in which he concluded that Vioxx had dangerous side effects. He claims that he was pressured by superiors to soften his conclusions, and that he complied only as much as he could to avoid compromising his "deeply held convictions." He was threatened and ostracized by the FDA, as a consequence. The drug manufacturer ultimately withdrew Vioxx from the market when an independent study confirmed Dr. Graham's conclusions.

Andrew Eller, a biologist working on Florida panther-related issues with the U.S. Fish and Wildlife Service, was terminated after accusing his agency of purposely relying on flawed scientific information regarding the Florida panther's likelihood of survival in the face of real estate development. The agency did so, he maintained, in order to facilitate the granting of construction permits to influential developers. The agency has reinstated Eller, conceding that some of his conclusions were correct. It has been alleged that the agency is under severe pressure from its political superiors to accommodate campaign contributors.

John Fitzgerald, an environmental analyst with the U.S. Agency for International Development in 2002, was responsible for monitoring compliance on certain overseas development projects. He attempted to report to Congress legal violations and environmental mismanagement regarding questionable energy projects in Africa, South America and Eastern Europe, but Treasury officials removed the information from his report before it reached Congress. His position was subsequently eliminated.

Richard Foster, Medicare's chief actuary, was responsible for providing cost estimates to Congress regarding several Medicare proposals under debate. Foster estimated that the actual cost of legislation would be 25% to 50% higher than the administration's public estimates but was prevented from providing his finding to Congress by the former Administrator of the Centers for Medicare and Medicaid Services. An investigation by the HHS Office of Inspector General concluded that CMS failed to provide the proper information requested by Congress and that the Administrator had warned Foster that he would be disciplined if he released his disfavored findings.

In short, as these few examples illustrate, those who would report misconduct or voice opinions unpopular with supervisors or managers face very real disincentives to persist. Perversely, the greater the magnitude of the problem and the cost, monetarily or politically, of correcting it, the greater is the risk to the small voice who is urging caution. Not all employees have the courage of Coleen Rowley, the FBI employee who attempted to draw attention within the FBI to its institutional failure to respond to indicators about impending terrorist attacks. The employee who identifies a serious institutional lapse that may have contributed to the nation's vulnerability to a terrorist attack, like the employee who

sees a safety risk threatening an imminent space shuttle flight or the opening of a new nuclear power plant, needs extraordinary courage to persist, once her views are heard and brushed aside. The loss of constitutional protection to this dissent only increases the disincentives. If these employees choose the safer course and remain silent, the cost to the public could be enormous.

**The Supreme Court's faith in "powerful" whistleblower protections is also misplaced.**

Federal employees will perhaps note the painful irony in the Supreme Court's references to the "powerful network" of whistleblower protections. Although some individual states may have strong whistleblower laws, the federal Whistleblower Protection Act is notoriously inadequate. Indeed, as interpreted by the U.S. Court of Appeals for the Federal Circuit (which holds a monopoly on deciding cases under the WPA), the WPA leaves open precisely the same loopholes that now exist under the First Amendment, in light of the Garcetti decision.

As an initial matter, the WPA, 5 U.S.C. 2302(b)(8), protects only disclosures related to certain types of information: that evidencing a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The court of appeals for the Federal Circuit has held that "mere" differences of opinion on debatable policy decisions do not constitute protected disclosures under the Act. See White v. Dept. of Air Force, 391 F.3d 1377, 1382 (Fed. Cir. 2004).

Similarly, the disclosures of would-be whistleblowers are routinely ruled unprotected because a decision-maker concludes, with the benefit of hindsight, that the alleged mismanagement the employee revealed is not sufficiently "gross"; that the complained-of dangers were described with insufficient specificity; that the identified problems were attributable to a course of action that was "debatable" at the time it was taken; that the waste of funds was not so "significantly" out of proportion to the benefit to the government as to constitute a "gross" waste of funds; or that the violation of law was "trivial."

Further, the Federal Circuit has erected an almost insurmountable barrier for employees to meet to demonstrate

that their disclosures were supported by the requisite "reasonable belief" that one of the narrow categories of wrongdoing has occurred. It requires an employee to establish, based on information known to that employee or readily ascertainable, that the government engaged in such serious errors that its conclusion was not debatable among reasonable people. White v. Air Force, 391 F.3d 1377 (Fed. Cir. 2004); Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), cert. denied, 528 U.S. 1153 (2000).

In addition, as interpreted by the Federal Circuit, the WPA contains the same gaping holes that the Supreme Court's decision in Garcetti has torn out of the First Amendment. Thus, disclosures by employees who are performing their normally assigned duties in reporting waste, fraud, abuse, or public health and safety hazards are not protected under the WPA, according to the Federal Circuit. See Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1351-54 (Fed. Cir. 2001); Willis v. Dept. of Agric., 141 F.3d 1139, 1144 (Fed. Cir. 1998). Similarly unprotected are disclosures made to the alleged wrong-doer, including the employee's supervisors. Horton v. Dept. of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996).

In short, only a very narrow subset of disclosures has the potential of protection under the WPA, as currently interpreted. Disputes over policy generally are specifically excluded, as are disagreements with the employee's supervisor and disclosures made in the course of the employee's duties. The WPA, as presently written and interpreted, provides no protection for employees whose speech the Supreme Court held in Garcetti was not protected by the First Amendment.

### **Suggested congressional responses**

**1. Strengthen the WPA:** It is, first and foremost, critical that the Congress amend the WPA to reverse the narrowing interpretations imposed upon it by the Federal Circuit. NTEU therefore urges that the House join the Senate, which recently passed S.494, the Federal Employee Protection of Disclosure Act, which would, among other things, close the loopholes in protection created by Garcetti.

Thus, S.494 would cover "a disclosure made in the ordinary course of an employee's duties." The proposed legislation would also cover discussions of waste, fraud, and abuse regardless of "prior disclosures." S. 494 would,

therefore, reverse the Federal Circuit's insistence that a disclosure is unprotected if it had previously been made in some other public forum. It also appears that S. 494, with its insistence on coverage of "any disclosure," would cover the most common type of disclosures of wrong-doing: those made to a supervisor or co-worker on the job.

Finally, we note that S. 494 would close several other significant loopholes in the WPA. For example, currently it is a "prohibited personnel practice" to take a "personnel action" against an employee in retaliation for making a covered whistleblower disclosure. See 5 U.S.C. 2302(a),(b)(8),(9). Not every form of retaliation by an agency, however, constitutes a "personnel action" within the meaning of 5 U.S.C. 2302(a)(2)(A).

Currently, an agency decision to investigate an individual for retaliatory reasons is not a "personnel action." Agencies have been known to subject a whistleblower to intensive and repeated investigations, in the hope of turning up some background "dirt" to discredit the employee and, indirectly, undermine the credibility of the information that the employee is disclosing. Adoption of S. 494 would correct this abuse, for it makes it a prohibited personnel practice to conduct an investigation because of protected activity.

Similarly, S. 494 would provide at least limited appeal rights to employees whose security clearances are revoked or denied in retaliation for whistleblowing. It would also end the Federal Circuit's monopoly on the adjudication of cases arising under the WPA. Finally, S. 494 would make it a prohibited personnel practice for an agency to implement or enforce a non-disclosure policy that is inconsistent with the WPA and other laws which protect employee free speech rights, including employees' statutory right to provide information to a member of Congress.

**2. Protect internal policy disagreements:** A key category of expression that remains highly vulnerable, even under S. 494, is disagreement over policy decisions that might not involve an allegation of an illegal act or specific wrong-doing, as required by the WPA. Garcetti has stripped such internal debate of any constitutional protection, and the WPA (as interpreted by the Federal Circuit) does not cover disagreements over debatable policy decisions. Even S. 494 excludes "communications concerning policy decisions that

lawfully exercise discretionary authority" unless the employee reasonably believes that the disclosure evidences a violation of law or other serious wrong-doing. As a consequence, there is no constitutional or statutory protection for employees who would refuse to be yes-men on policy questions--unless those employees take the dispute into the public arena.

The Supreme Court in Garcetti acknowledged that its holding means that employees may be better protected if they air their views publicly than if they work only internally, through official channels. Slip op. 11-12. Thus, an employee's public expression--in a letter to the editor, press interview, or public speech--will still have the First Amendment protection denied to expression made only to supervisors, in the course of the employee's duties. As a consequence, anyone advising an employee anxious to report a major problem uncovered on the job would have to counsel the employee to consider bringing the debate directly into the public forum, in order to obtain First Amendment protection. Garcetti thus, unfortunately, creates a perverse incentive, counter-productive to basic tenets of good government management, to air disagreements in the public arena.

To address this anomaly, the Supreme Court itself suggested the creation of internal fora for the expression of dissenting opinions. NTEU urges Congress to explore the creation of such institutions through statute and government-wide regulation.

Some preliminary steps have been taken by individual agencies, such as the Nuclear Regulatory Commission and the Food and Drug Administration. Employees at those agencies, represented by NTEU, care deeply about the issues on which they work and look for means to express their opinions and their professional disagreements, without fear of reprisal. Their agencies have agreed to give their employees the right to preserve in the record their professional disagreements of opinion. See 21 C.F.R. 10.70 (FDA); NRC Directive 10.159 (The NRC Differing Professional Opinions Program). NTEU has supplemented those protections with contractually negotiated rights, in order to address employees' feelings of vulnerability when they express their professional opinions. See NTEU-FDA Collective Bargaining Agreement, Art. 5, Sec. 20; NTEU-NRC Collective Bargaining Agreement, Art. 3.9.

NTEU suggests that this Committee investigate adoption of similar protections on a government-wide basis, in addition to

the creation of internal agency fora to hear dissenting opinions.

### **3. Curb agency tendencies toward unnecessary secrecy:**

Finally, NTEU urges this Committee to investigate the very disturbing tendency of government agencies to adopt Draconian nondisclosure policies designed to threaten and intimidate employees who would speak publicly, using information that is neither classified nor sensitive, about important issues within their agencies related to the public safety and well-being.

It is NTEU's belief that a governmental culture of secrecy and enforced orthodoxy is increasing. A significant number of agencies, such as those within the Department of Homeland Security, are adopting and enforcing broad and vague nondisclosure policies that effectively chill any employee expression on matters of public concern, even though no classified or other truly sensitive information is disclosed.

At the Bureau of Customs and Border Protection within DHS, for example, employees are barred from disclosing "official information" without proper authority. "Official information" includes "any information that an employee acquires by reason of CBP employment, that he or she knows, or reasonably should know, has not been made available to the general public." The prohibition encompasses information that the agency concedes is neither classified nor law enforcement sensitive.

The breath-taking sweep of this secrecy provision operates to keep out of the public domain the valuable opinions of CBP employees about virtually all aspects of the their employment, including the adequacy of staffing levels and training, as well as flawed initiatives like the agency's "One Face at the Border Program." Indeed, because of the vagueness of the CBP policy, employees engage in self-censorship, and fear speaking publicly on any topic remotely related to their employment, to avoid the risk of disclosing so-called "official information."

Broad nondisclosure policies that require prior permission before speaking to the media are of doubtful constitutionality. See Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998); c.f., Weaver v. U.S. Information Agency, 87 F.3d 1429 (D.C. Cir. 1996). The rise of such policies is

thus a development that requires serious attention by Congress. In the meantime, S. 494 takes some valuable steps in the right direction by requiring nondisclosure policies to outline the statutory rights, obligations, and liabilities of employees.

Again, NTEU thanks the Committee for the opportunity to submit these remarks and ask that they be entered into the official hearing record.

